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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA**

THERESA DUTCHUK, ANNALISA  
HEPPNER, LIZ ORTIZ, RANNA WELLS,  
NORMA JOHNSON, AND JANE DOE VI

*Plaintiffs,*

vs.

DAVID YESNER, UNIVERSITY OF  
ALASKA BOARD OF REGENTS AND  
UNIVERSITY OF ALASKA SYSTEM,

*Defendants.*

**Case No.: 3:19-cv-00136-HRH**

**PLAINTIFFS' SUR-REPLY IN  
OPPOSITION TO DEFENDANTS  
UNIVERSITY OF ALASKA BOARD  
OF REGENTS AND UNIVERSITY OF  
ALASKA SYSTEM'S PARIAL  
MOTION TO DISMISS**

1 **PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS UNIVERSITY**  
2 **OF ALASKA BOARD OF REGENTS AND UNIVERSITY OF ALASKA**  
3 **SYSTEM'S PARTIAL MOTION TO DISMISS**

4 COME NOW, Plaintiffs, and file this Sur-Reply in Opposition to Defendants  
5 University of Alaska Board of Regents and University of Alaska System's ("University of  
6 Alaska") ("Defendants") Partial Motion to Dismiss and would respectfully show this Court  
7 the following:

8 **UNIVERSITY OF ALASKA'S CONTINUED DISHONESTY**

9  
10 University of Alaska has continued to be dishonest with Plaintiffs and the  
11 community. Just recently, President of University of Alaska, Jim Johnsen, gave a televised  
12 interview on June 26, 2019 to respond to Plaintiffs' lawsuit and the University's Title IX  
13 problem at large. Mr. Johnsen admitted that "people have been damaged. I don't think there  
14 is any getting over these cases, especially the victims so **we are doing our very, very best**  
15 **to remedy what we can.**"<sup>1</sup> Mr. Johnsen also apologized for the incidents and stated that  
16 the University will be supportive and relentless in dealing with these cases.  
17  
18

19 "I'm sorry. I mean these are tragedies, right? They can't be fixed today so simply.  
20 People have been hurt. And we as an organization, we as people, can do our very  
21 best to help them, to grieve with them, but it's not fair. I don't think the system is  
22 fair yet, frankly. And it pains me to say that. That said, at the University of Alaska,  
23 anyway, we are going to be relentless in dealing with these cases and also as  
24 supportive and compassionate as we can be to the victims in these matters."<sup>2</sup>

25 Yet University of Alaska has not withdrawn their Motion to Dismiss.  
26

27 <sup>1</sup> Daniella Rivera, "'People have been hurt': UA President Jim Johnsen discusses efforts to address Title IX  
28 complaints," KTVA (June 26, 2019), <https://www.ktva.com/story/40713254/people-have-been-hurt-ua-president-jim-johnsen-discusses-efforts-to-address-title-ix-complaints>.

<sup>2</sup> *Id.*

1 Infuriatingly and yet not surprisingly, Mr. Johnsen said that they still have not  
2 improved their policies to address these types of sexual assault and sexual harassment  
3 situations. **“I do not believe we have made any particular policy changes since then.”**<sup>3</sup>

4  
5 Besides University of Alaska’s statute of limitations challenge to Plaintiffs’ claims,  
6 they do not challenge that Plaintiffs’ Second Amended Complaint states a claim for relief  
7 under Title IX—only that Plaintiffs’ claims are time-barred. But dispute over the date of a  
8 cause of action accrues is a classic factual dispute that precludes 12(b)(6)-stage dismissal.<sup>4</sup>  
9  
10 Thus, if the Court agrees that Plaintiffs have not “conclusively” pled themselves out of  
11 court, it should deny University of Alaska’s motion. If University of Alaska wants to  
12 challenge Plaintiffs’ allegations, it can do so at summary judgment but not on a motion to  
13 dismiss.  
14

### 15 **STANDARD OF REVIEW**

16 **A Rule 12(b)(6) motion is generally an “inappropriate vehicle” for dismissing**  
17 **a claim based upon a statute of limitations<sup>5</sup>, and courts disfavor dismissing claims as**  
18 **untimely at the motion-to-dismiss stage.<sup>6</sup>** Ordinarily, a Fed. R. Civ. P. 12(b)(6) motion  
19 cannot be used to raise an affirmative defense.<sup>7</sup> Plaintiffs have no duty to plead facts  
20 negating an affirmative defense.<sup>8</sup> And although the statute of limitations provides an  
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25 <sup>3</sup> *Id.*

26 <sup>4</sup> “[T]he determination of when a cause of action accrues is to be decided by the trier of fact.” *Kehoe Component Sales*  
27 *Inc. v. Best Lighting Prod., Inc.*, 933 F. Supp. 2d 974, 1016 (S.D. Ohio 2013) (citing *Dalesandro v. Ohio Dep’t of*  
28 *Transp.*, No. 10AP-241, 2010 WL 5238609, at \*3 (Ohio Ct. App. Dec. 16, 2010).

<sup>5</sup> *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012).

<sup>6</sup> *See Beco Dairy Automation, Inc. v. Glob. Tech Sys.*, No. 1:12-cv-01310 LJO SMS, 2015 U.S. Dist. LEXIS 13050  
at \*27 (E.D. Cal. Sep. 28, 2015).

<sup>7</sup> *Stanwyck v. Bogen (In re Stanwyck)*, 450 B.R. 181, 190 (Bankr. C.D. Cal. 2011).

<sup>8</sup> *Id.*

1 affirmative defense, it does not create a jurisdictional defect that strips a court of authority  
2 to determine a plaintiff's claims.<sup>9</sup>

3 Dismissal based on statute of limitations is only appropriate if the complaint "shows  
4 conclusively on its face that the action is indeed time-barred."<sup>10</sup> Accepting the well-pleaded  
5 facts as true, as a court must,<sup>11</sup> Defendants' motion fails because Plaintiffs' Second  
6 Amended Complaint shows that Plaintiffs' Title IX claims accrued (with the exception of  
7 Jane Doe VI's claims which have no statute of limitations for felony sexual assault) only  
8 just recently or that Plaintiffs only discovered their claims against University of Alaska  
9 recently. Plaintiff Jane Doe I did not even know that Defendant Yesner had sexually  
10 suggestive photographs of her until the final report was released in March 2019.

11 Furthermore, "awareness, [of the existence of the injury and causation] does not  
12 mean actual knowledge; rather, all that must be shown is the existence of 'circumstances  
13 [that would lead a reasonable person to investigate further.'"<sup>12</sup> So even if Plaintiffs were  
14 aware that Yesner assaulted, harassed and injured them, they had no reason to know or  
15 suspect—until December 2017, at the earliest, when University of Alaska initiated an  
16 investigation—that University of Alaska's deliberate indifference to complaints and its  
17 unreasonable failure to take action contributed to their harassment and abuse or in their  
18 denial of educational benefits at University of Alaska.

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26  
27 <sup>9</sup> See *Whitehorn v. FCC*, 235 F. Supp. 2d 1092, 1096 (D. Nev. 2002).

<sup>10</sup> See *Neveau v. City of Fresno*, 392 F. Supp. 2d 1159, 1169 (E.D. Cal. 2005).

<sup>11</sup> *Id.*

28 <sup>12</sup> *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 616 (W.D. Tex. 2017)(quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001)).

1 This means that it was not until December 2017, at the earliest, that Plaintiffs first  
2 knew University of Alaska could have—and should have—stopped or prevented their  
3 harassment but did not. Indeed, the case to which Defendants cite in their Reply actually  
4 helps Plaintiffs’ argument. In *Reasner v. State Dep’t of Health & Soc. Servs.*, the Supreme  
5 Court of Alaska held that  
6

7 **“under the discovery rule, the date on which a statute of limitations begins to**  
8 **run is a *question of fact*.”**

9 394 P.3d 610, 616 (Alaska 2017), *amended* (May 19, 2017).

10 **“While the need for the discovery rule is most apparent when a plaintiff’s**  
11 **injury is undiscovered and reasonably undiscoverable, Alaska’s formulation of**  
12 **the discovery rule is broad enough to cover other undiscovered and reasonably**  
13 **undiscoverable elements such as whether the cause of the injury was tortious.**  
14 **The discovery rule in tort suits protects plaintiffs whose injury is known but**  
15 **the cause is not reasonably discoverable during the limitations period.”**

16 *Id.* at 615; *See Pedersen v. Zielski*, 822 P.2d 903, 907 (Alaska 1991).

17 And because disputes over a claim’s accrual date is a classic factual dispute,  
18 University of Alaska gives this Court no choice but to deny its motion to dismiss.

## 19 **ARGUMENTS & AUTHORITIES**

20 **A. AS 9.10.065 does apply to Jane Doe VI’s Title IX claims against the University.**

21 Defendants cite to *Reasner v. State*, 394 P.3d 610 (Alaska 2017) to say that Jane  
22 Doe VI’s felony sexual assault claims do not apply to University of Alaska and therefore  
23 she can not avail herself of the AS 9.10.065 statute. This law states that that there is no  
24 statute of limitations deadline for claims of felony sexual assault. However, the *Reasner*  
25 case did not involve Title IX claims which is what Plaintiff Jane Doe VI alleges in the  
26  
27  
28

1 Complaint. Title IX does not explicitly provide a statute of limitations.<sup>13</sup> Accordingly,  
2 Courts have applied the most applicable state statute of limitations<sup>14</sup>. Here, Jane Doe  
3 VI's claim is for felony sexual assault which carries no statute of limitations pursuant to  
4 AS 9.10.065. Therefore, the Court must apply the state statute of limitations for Jane Doe  
5 VI's Title IX claim which is the AS 9.10.065 law. Jane Doe VI's claims for Title IX against  
6 the University are thus timely.

7  
8  
9 **B. Regardless, Plaintiffs allege they did not discover the existence of their claims  
10 against University of Alaska until recently.**

11 Under the federal discovery rule, "the statute of limitations begins to run when a  
12 reasonable person knows, or in the exercise of due diligence should have known, both his  
13 injury *and the cause of that injury*."<sup>15</sup> Here, that cause is University of Alaska, which  
14 Plaintiffs could not have known until December 2017 because University of Alaska kept  
15 its involvement and enablement a secret.

16  
17 In *Hernandez v. Baylor University*,<sup>16</sup> the Western District of Texas declined to  
18 dismiss plaintiff's Title IX claims as untimely when she alleged that she first became aware  
19 of the university's deliberate indifference to a known issue of sexual misconduct within its  
20 football program four years after the university football player assaulted her—when a law  
21 firm investigating the university's handling of sexual-assault allegations released its  
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25  
26 <sup>13</sup> See *Kunzi v. Ariz. Bd. of Regents*, No. CV-12-02327-PHX-JAT, 2013 U.S. Dist. LEXIS 167181 at \*6-7 (D. Ariz.  
Nov. 25, 2013).

27 <sup>14</sup> *Id.*; see also *Stanley v. Trs. of the Cal. State Univ.*, 433 F.3d 1129 (9th Cir. 2006) ("Title IX does not expressly  
28 provide any statute of limitations. Because a Title IX suit is a civil rights action, the court borrows the most appropriate  
state statute of limitations.")

<sup>15</sup> See also *Cook v. Sibjet*, CV. No. 98-669-HA, 2000 U.S. Dist. LEXIS 20908 (D. Or. Dec. 15, 2000).

<sup>16</sup> *Hernandez*, 274 F. Supp. 3d 602 (W.D. Tex. 2017).

1 report.<sup>17</sup> Although the plaintiff knew she had been assaulted and that the perpetrator had  
2 assaulted other women, the court believed it was reasonable to infer that her claims did not  
3 accrue until later investigations publicly revealed that the university knew and could have  
4 prevented her assault.<sup>18</sup>

6 Here, Plaintiffs' situation is similar to the Plaintiff's in *Hernandez*, except Plaintiffs  
7 in this case did not know they had been harassed and sexually assaulted until years later.  
8 University of Alaska hired an outside law firm to conduct an investigation into the claims  
9 made against Professor Yesner in December 2017. The report was not released until March  
10 2019. Plaintiffs first became aware of the university's deliberate indifference to a known  
11 issue of sexual misconduct within the Anthropology department years after Yesner  
12 assaulted and harassed them—when a law firm investigating the university's handling of  
13 sexual-assault and harassment allegations released its report.

16 University of Alaska affirmed Plaintiffs' belief that nothing was wrong by  
17 continuing to maintain Yesner as a Professor and continuing to allow him to teach students  
18 on campus. For this reason, Plaintiffs had no reason to suspect or to further investigate any  
19 claims regarding University of Alaska's actions—or lack thereof—until University of  
20 Alaska initiated a full-blown investigation in December 2017.

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25 <sup>17</sup> *Id.* at 617 (denying motions to dismiss pre-assault Title IX claims based on a statute of limitations defense, holding  
26 that, based on allegations, plaintiff "had no reason to suspect that Baylor's alleged deliberate indifference played a  
27 role in her assault," where Plaintiff did not learn of university's role in causing her sexual assault until law firm hired  
28 to investigate university's handling of sexual assaults released findings years later); *see also Doe 1 v. Baylor Univ.*,  
240 F. Supp. 3d 646, 663. (W.D. Tex. 2017) (same); *T.R. v. Boy Scouts of America*, 181 P.3d 758, 766 (Or. 2008)  
(where plaintiff was sexually abused by a police officer, the date when plaintiff's federal civil rights claim against city  
began to accrue was a question for jury, and it was reasonable for jury to conclude that claim accrued when plaintiff  
discovered from news coverage the city's role in causing sexual abuse by police officer).

<sup>18</sup> *Hernandez*, 274 F. Supp. 3d at 616-617.

1 But even if Plaintiffs had investigated into Yesner's conduct further, they would  
2 have run into a giant road block placed by the University and would have been reassured  
3 by the University as they had been time and time again that "that's just Yesner being  
4 Yesner", "That's your story. I bet Yesner has something else he would say," or "don't  
5 believe the stories." Furthermore, their investigations would have been futile considering  
6 the virtues and commendations that University of Alaska bestowed upon David Yesner,  
7 going so far as to award him emeritus status upon retirement despite the Plaintiffs' initial  
8 objections.  
9

10  
11 Plaintiffs' Second Amended Complaint alleges that University of Alaska's failures  
12 occurred in December 2017 and March 2019 or were only discoverable in December 2017  
13 and March 2019, meaning Plaintiffs' claims are not time-barred.  
14

### 15 **CONCLUSION AND PRAYER**

16 If University of Alaska believes Plaintiffs knew or should have known sooner, then  
17 let University of Alaska demonstrate this in discovery. But to extinguish Plaintiffs' claims  
18 now—particularly when the law permits claims as pled—simply devastates the victims  
19 even more. For the reasons stated above, Defendants' Motion to Dismiss should be denied  
20 in its entirety.  
21  
22

23  
24 DATED: February 14, 2020  
25  
26  
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28

Respectfully submitted,

By: /s/ Cornelia Brandfield-Harvey

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/s/ Cornelia Brandfield-Harvey  
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